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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE JAMES DONATO

IN RE: GOOGLE PLAY STORE)
ANTITRUST LITIGATION) No. 21-2981 JD
)
) San Francisco, California
) Thursday, July 22, 2021

TRANSCRIPT OF ZOOM VIDEO CONFERENCE PROCEEDINGS

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Thursday - July 21, 2021

10:03 a.m.

P R O C E E D I N G S

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THE CLERK: Calling Multi District Litigation No. 21-2981 In Re Google Play Antitrust Litigation.

Counsel for the plaintiffs please, state your appearance.

MR. BORNSTEIN: Good morning, Your Honor. This is Gary Bornstein from Cravath for plaintiff Epic Games.

MR. EVEN: Good morning, Your Honor. Yonatan Even from Cravath for Epic Games.

MS. GIULIANELLI: Good morning. It's Karma Giulianelli from Bartlit Beck for the consumer class.

MS. NAM: Hae Sung Nam from Kaplan Fox for the consumer class.

MS. PRITZKER: And Elizabeth Pritzker from Pritzker Levine on behalf of the plaintiff consumer class.

MS. COOLIDGE: Good morning. This is Melinda Coolidge from Hausfeld for the developer class.

MR. WOJCIK: Good morning. This is Ted Wojcik from Hagens Berman for the developer class.

THE CLERK: Counsel for the defendants.

MR. ROCCA: Good morning. It's Brian Rocca of Morgan Lewis representing the Google defendants.

MR. PETROCELLI: Good morning, Your Honor. Daniel Petrocelli from O'Melveny and Myers representing the Google

1 defendants.

2 **THE COURT:** Okay. Well, I was actually hoping our
3 State and Commonwealth new arrivals would be here. Anybody
4 talk to them about joining us?

5 **THE CLERK:** Somebody is raising their hand. I'm
6 assuming that's them. I'll move them over.

7 **THE COURT:** That would be great. They are fully
8 consolidated, so time to have them in.

9 (Brief pause.)

10 **THE CLERK:** Ms. Blizzard, you want to turn your
11 camera on and state your appearance for the record.

12 **MS. BLIZZARD:** Good morning, Your Honor. This is
13 Paula Blizzard from the California Attorney General's Office.

14 I don't believe we were aware that they were supposed to
15 appear today, but I was listening, so I quickly grabbed a
16 jacket and here I am.

17 **THE COURT:** Okay. Well, that's fine for the moment.
18 I had -- I had assumed that once the consolidation order was
19 posted, everybody would be here, but that's fine.

20 So a lot of what I was going to say today was going to be
21 directed to our new arrivals, but I'm going to let you all
22 shepherd the message to them so that we can keep on track.

23 So I want to make sure as you get together and finish that
24 scheduling order that you say is going to come out next
25 Thursday, you address a couple of things that I'm particularly

1 interested in. I want to know your thoughts. You all are
2 running the case so far and are closer to it than I am.

3 Here are the things I want to make sure that we cover. So
4 now with the arrival of the States and Commonwealths, we're
5 taking on a different form obviously. It's going to have some
6 impacts on things.

7 One thing I do want to do is let's just set a regular
8 date. You know, something like the third Thursday of every
9 month, whatever Thursday you want, but just pick a Thursday
10 each month. That will be your status conference date.

11 Now, as we've done so far, you can cancel. If everybody
12 wants to cancel, that's perfectly fine with me.

13 You can also attend by proxies. Okay? We don't need to
14 have, you know, a Roman legion showing up for every status
15 conference. You can delegate your decision-making powers to a
16 representative. You know, a core set people can come in.

17 So no party should feel obligated to attend each one as
18 long as you're going to entrust your vote to somebody.

19 My only requirement is that whoever shows up, has to have
20 decision-making powers that are binding because if we make some
21 decisions, I don't want to hear: Oh, I have to go back and
22 check with the group. That sort of defeats the whole purpose
23 of the Thursday check-in. So make sure you hold an actual
24 proxy from whoever you're going to appear on behalf.

25 I actually would encourage smaller groups. There is no

1 need to spend an enormous amount of money on every status
2 conference since we're going to be having them so regularly,
3 but I leave that all up to you. But just propose a Thursday.
4 Pick one, and we'll make that our day.

5 Please make sure in the scheduling order that you start to
6 detail what we're going to do for experts. As you know, I will
7 hold hot tub proceedings. I favor those. They have been very
8 effective in my other MDLs. So start working out some, you
9 know, at least high levels proposals on how we're going to do
10 that and when we might do that.

11 And then for summary judgment, I think we've discussed
12 this before.

13 This is really for the benefit of the States and the
14 Commonwealths that are arriving, but let me repeat it for
15 everybody. It has its place and its time. You know that. I
16 know that. It's provided for in the Federal Rules, but it has
17 to be used wisely.

18 Please see my *FTC v D-Link* decision. It will give you my
19 general position on summary judgment. I'm not at all ruling it
20 out. I'm not saying it's impossible in this case. But you,
21 know if, I get 70 pages of summary judgment briefing backed up
22 by a thousand exhibits, the odds are you're going to get a very
23 short denial based on the presence of genuine disputes of
24 material facts. So keep that in mind as you approach summary
25 judgment.

1 I don't know how you're going to build this into the
2 schedule, but I'll leave that up to you to work out.

3 Now, here is the big issue in my view, and that is the
4 trial date. I would like to keep what we have on calendar.
5 Now, that may not be realistic. I don't know. I'm going to
6 leave it up to you to tell me after you all have a chance to
7 talk about it.

8 I am also getting concerned about how we're going to do
9 the trials, and so I actually want to work out our concept, at
10 least at a high level. More than a high level. At least at a
11 fairly detailed level by September. I want to know, you know,
12 where the train is going. Okay? So we're going to work this
13 out.

14 Right now I think there is a presumption that we're going
15 to have different trials for different plaintiff's groups. I'm
16 not sure that makes a lot of sense.

17 Here is my idea. I think we can have maybe two trials at
18 the most, and we can accomplish that by bifurcating the
19 liability trial from the damages trial.

20 I'm just talking out loud here. So you all react to this
21 and tell me why it's wrong or what you want to do, but here is
22 my sense.

23 The liability phase, it looks to me that the plaintiffs
24 are more or less all on the same page. Okay? I mean, there
25 are broad liability themes that are common to all the

1 Complaints that I have seen so far.

2 Now, I haven't seen the new ones, but I'm assuming they
3 are not going to be terribly different from what I have seen so
4 far.

5 So if that's true, we can, you know, make life easy for 6
6 to 12 hard-working citizens of this district who are going to
7 be your jurors by having one liability trial. And then
8 depending on how that goes, we might have separate damages
9 trials.

10 You know, damages, you're all diverging a little bit.
11 There are different remedies, different amounts, different
12 injuries. So that -- that may be something that would require,
13 you know, more than -- at least one, but maybe more than one
14 post-liability trial.

15 Now, I normally don't do this. In fact, I actively don't
16 bifurcate. But in this case I think it might make sense.

17 What I want to avoid -- and I want you to give me your
18 guidance on this. I want to avoid trying the same liability
19 question more than once. Okay? That's just not -- that's not
20 feasible. It doesn't make any sense from a resource
21 perspective, and it invites chaos.

22 So the main goal that I'm looking for is one trial on
23 every liability issue. So if you can all work that out or give
24 me some guidance on how that might happen, I think that would
25 be great.

1 Damages I'm most concerned about. If we have to do
2 multiple proceedings or something afterwards, I think we can
3 work that out.

4 But you also need to give me your guidance on timing, too.
5 I don't want anyone to feel jammed, but, you know, I don't want
6 this to go on forever. So, and I know you don't either, and I
7 know your clients don't either. So work something out with
8 respect to that.

9 Okay. Any questions so far, or any thoughts so far?

10 (No response.)

11 **THE COURT:** All right. Now --

12 **MS. BLIZZARD:** Your Honor? If I may, Your Honor.

13 **THE COURT:** Yes.

14 **MS. BLIZZARD:** Good morning. Now that I'm a little
15 more organized, let me say on behalf of the States that we are
16 delighted to be here, delighted to be before you --

17 **THE COURT:** Well, I was going to welcome everyone to
18 the Northern District, but I'll do it through you. Happy to
19 have all of our State and Commonwealth entities in.

20 **MS. BLIZZARD:** Absolutely. I will convey that back
21 to them.

22 And I will also mention that we are ready to hit the
23 ground running. We intend to get on the same schedule as
24 everyone else. We are not intending to slow things down in any
25 way. And we will begin working with our co-plaintiffs, and

1 even with Google --

2 **THE COURT:** Not even. You have to work with Google,
3 too.

4 **MS. BLIZZARD:** Absolutely. Absolutely. So, and we
5 ourselves have also been exploring, thinking about each --
6 bifurcation.

7 So I think that we are going to come in seamlessly and,
8 hopefully, contribute and not slow things down that. That's
9 certainly our intention.

10 **THE COURT:** That is music to the judge's ears. Let's
11 hope you can keep playing that song, but we'll see.

12 Now, but really, let's start -- we have to get the trial
13 locked down. So by September I want to have a firm trial plan
14 in place.

15 And the other thing is I think -- you know, almost all of
16 you are original filers in this district, so there is no
17 transfer or transferee issue. I think there are a couple of
18 cases that may have been transferred in.

19 I do want to get lexicon waivers or some response about
20 lexicon waivers from the people who transferred in. So, I
21 can't remember where they are. I think they are probably on
22 the consumer developer side. But you all who are lead counsel
23 in that need to talk with those people about -- about getting
24 those waivers.

25 Okay. That is really all that I wanted to cover -- oh,

1 one other thing. I'm sorry. This is a big issue.

2 I was concerned to see -- I'm not blaming anybody, because
3 I know this happens not necessarily because the filing entity
4 wants to do this, but I was concerned to see redacted
5 Complaints.

6 Now, I have written on many occasions about our sealing of
7 administrative -- you know, administrative motions to seal
8 records, typically in the Motion to Dismiss or summary judgment
9 context.

10 I, like most federal judges, take a very dim view of
11 hiding case facts from the public. I don't like it. It's not
12 right. The public has a right of access to each and every
13 everything that happens in their public courtrooms, which is
14 us.

15 So I'm particularly sensitive to the idea that anything in
16 the Complaint, the foundational document for each lawsuit,
17 would ever be filed.

18 So I need to see good administrative motions from whoever
19 is seeking to file those portions of the Complaint as to why
20 they should be hidden from public view. And you need to fit
21 yourself into our current prevailing standards on sealing in
22 the Ninth Circuit.

23 Now, I don't think I've seen an administrative motion to
24 file the State complaint. I got a redacted version, but you
25 need to bring a motion for that. You need to file an

1 unredacted version as well under seal so I can see what's
2 actually going on.

3 And I think maybe the developers, the consumers or someone
4 else is in the same position.

5 I believe Epic did the right thing. They filed the
6 redacted Complaint and then in an administrative motion they
7 attached the unredacted.

8 Now, look. If it's not your burden -- and I'm assuming
9 you all on the plaintiff's sides are doing this because you
10 feel compelled to.

11 Google, you need to carry the ball. All right? The
12 plaintiffs aren't -- you need to file a statement telling me
13 why -- how it could ever be reasonable to seal a portion of the
14 Complaint. Okay?

15 So here is what you may want to do. You may just want to
16 wait until all the Complaints are in, which I think is like now
17 or soon, and then you can just file an omnibus statement.
18 Okay?

19 And maybe along the way you can take a hard look at what's
20 been sealed and make some independent decisions that cut it
21 down or maybe eliminate it entirely. I leave it up to you.

22 But how about -- so am I right, Mr. Rocca? Are all the
23 Complaints in now.

24 **MR. ROCCA:** Yes, Your Honor. Thank you for raising
25 these issues. They came in last night.

1 And this was on my mind in particular because I'm
2 cognizant of local Rule, I think, 79-5, that gives, in this
3 case Google, four calendar days, two of which fall on the
4 weekend, to provide the Court with the information you're
5 identifying.

6 So if we could just adjust that by a few extra days so we
7 can think through these issues and present an omnibus paper,
8 that would be most appreciated and most efficient.

9 **THE COURT:** I think that's fine. Take two weeks. I
10 want you to talk with your colleague and see what you can work
11 out.

12 I am telegraphing where I'm coming from. I don't like it,
13 and it's not consistent with the public's right to access,
14 particularly in a case with this type of public interest and
15 profile.

16 So there may be something that is so sensitive that it
17 warrants being kept out of the public eye, but you're going to
18 have to show that to me in a fashion that meets our prevailing
19 rules.

20 Now, I will tell you, I'm on our Court's Local Rules
21 Committee, and we are contemplating a revision of Rule -- the
22 sealing rule -- 79-5. That hasn't happened yet. It's not
23 going to impact anything you're doing, but it will make life
24 easier if the rule gets adopted in the form that we're
25 currently discussing. And who knows, there are many steps

1 between now and then. It will make life a lot easier.

2 But in the meantime, you know, just take a look at
3 *Kamakana*, I think the name of the case is, and *Center For Auto*
4 *Safety*.

5 And by the way, those are harmonious cases. You will see
6 some judges have concluded that -- if I'm getting the case
7 names right -- *Center For Auto Safety* in some way overruled or
8 displaced the prior case. It did not. It's a three judge
9 panel in each thing. They don't have the authority to overrule
10 each other. It is -- and, in fact, *Center For Auto Safety* is
11 built on precedent.

12 So don't take the view, because I reject it, that those
13 cases are in any way a break with each other. I consider them
14 to be a -- part of a continuous and harmonious approach to
15 sealing.

16 But the main event is telling me why it should be sealed
17 at all, and that's going to be on Google. So take your time.
18 Two weeks. If that's not, just enough let me know. Talk with
19 your friends here on the other side and see what you can work
20 out.

21 Just tee up for me the things that you really -- you know,
22 that you cannot live with for whatever reason being in the
23 public domain, and I will take it from there. Okay?

24 **MR. ROCCA:** Very well, Your Honor. Thank you.

25 **THE COURT:** Okay. Well, that's basically all I

1 wanted to do today.

2 **MR. BORNSTEIN:** Your Honor, may I raise one comment
3 briefly in response to your comments?

4 **THE COURT:** Yes.

5 **MR. BORNSTEIN:** Gary Bornstein on behalf of Epic,
6 Your Honor.

7 In the scheduling discussion Your Honor referred to 6 to
8 12 hard-working citizens of the district. And at least
9 speaking for Epic, we do not have a jury demand in our
10 Complaint, and we are not seeking damages.

11 I'm not asking for a ruling from the Court, and this is a
12 subject that we need to discuss with Google and with the other
13 parties.

14 I just wanted to make sure it was on Your Honor's radar
15 that at least from our perspective, this was not necessarily
16 going to be a case that got tried to a jury rather than being
17 tried to Your Honor.

18 The parties will discuss and hopefully agree on a process,
19 but I just wanted to make sure it was something that the Court
20 was aware of. And we'll be back to Your Honor on this,
21 hopefully, with agreement of some sort.

22 **THE COURT:** All right. Well, thank you for
23 mentioning that.

24 Look, in our constitutional system the jury is the default
25 mechanism for dispute resolution. So I really would like you

1 to think about that.

2 And I have -- I'll tell you, as every other federal judge,
3 every federal trial judge I know will tell you, juries do a
4 fantastic job, and you can count on them. There is no case
5 that is too hard for them. There is no case that they cannot
6 get, as long as the advocates tee it up the right way. And if
7 you do that, I guarantee you you will get a product that you
8 will be proud of. Win or lose, you will be proud of the system
9 that produced it.

10 So I am strongly in favor of taking advantage of our
11 Seventh Amendment common law jury trial system to resolve your
12 dispute. So please keep that in mind. Okay?

13 It will also relieve a lot of scheduling headaches because
14 I do not know how we're going to do a bench trial and a jury
15 trial on the same issues.

16 In fact, to be honest, just thinking off the top of my
17 head, no matter what happens, I think the jury portion would be
18 tried first.

19 And so if you want to wait, you know, you can do that.
20 You'll be back at the end of the line, but you're going to miss
21 a lot of fun in the courtroom when that happens.

22 So, please, think it over. And, you know, we really, I
23 think, should be honoring our jury system in a way we approach
24 a case of this magnitude. That's my view.

25 Now, your hands are not tied. So if you want to do

1 something else, I'll take it into account, but that's sort of
2 my perspective.

3 **MR. BORNSTEIN:** Understood, Your Honor. Thank you.
4 We will discuss with our client and with the other parties.

5 **MR. ROCCA:** Your Honor, if I may?

6 **THE COURT:** Yeah.

7 **MR. ROCCA:** Thank you, Your Honor. Brian Rocca for
8 Google.

9 A minor procedural wrinkle that's triggered by the
10 amendment of the Complaints which we received late last night.
11 There is a little bit of ambiguity between Rules 12 and 15 of
12 the Federal Rules of Civil Procedure. Some Courts have held
13 that when it comes to an Amended Complaint, a Motion to Dismiss
14 doesn't satisfy the obligation to respond.

15 So can you just clarify that other than the Motion to
16 Dismiss, that Google will await further order of the Court --

17 **THE COURT:** Yes.

18 **MR. ROCCA:** Very well.

19 **THE COURT:** I understand what you're saying. Please
20 let's get through the motions and then whatever happens after
21 that.

22 Don't file an answer. Okay? You don't have to answer
23 anything until we talk more about it. Okay?

24 **MR. ROCCA:** Very well. Thank you, Your Honor.

25 **THE COURT:** I mean, look. I haven't read the motions

1 obviously. You haven't filed them. But no matter what
2 happens, there will be leave to amend.

3 So, you know, unless something terribly unusual is
4 presented by your motions, there will be at least one more
5 round of amendment. So you may not answer for awhile. So
6 don't -- don't worry about it.

7 **MR. ROCCA:** Understood, Your Honor.

8 **THE COURT:** That's for all the Complaints, for
9 everybody. Okay?

10 Oh, by the way, so -- well, I was -- I was going to
11 suggest maybe -- how are we going to coordinate -- so are you
12 all on the same timeline now for the Motions to Dismiss? Is it
13 all just going to be one day, or this is going to be --

14 **MR. ROCCA:** Your Honor, I can briefly address that.

15 We had presented to the Court --

16 **THE COURT:** Yes, your scheduling statement; right?

17 **MR. ROCCA:** Yes, it's a scheduling statement. We
18 have worked out dates that make sense.

19 The States, I think, are generally aware. They weren't
20 related yet, so the States, hopefully, will be participating in
21 that schedule.

22 The only thing we haven't worked out, because we just
23 received the Amended Complaints last night and we were only
24 served with the State Complaint very recently, is the
25 pagination issue.

1 We're mindful of the Court's prior guidance of omnibus
2 papers and then separate shorter briefs on discrete issues that
3 may relate to a particular defendant -- I'm sorry, a particular
4 plaintiff. So I think that's the plan.

5 We will maybe revert back to you in a couple of weeks with
6 a pagination proposal, but generally speaking we understand
7 your preference is for coordinated briefing and a single
8 hearing date, which we've proposed.

9 **THE COURT:** Yeah. No. I think that's absolutely
10 right.

11 And, Ms. Blizzard, it's not until October, so I imagine it
12 won't be too much of a problem. But if there is any issue,
13 talk with -- talk with, you know, everybody here so far.

14 All right. If you need to change this, I mean, you have
15 til next week, so you can fiddle with the schedule if you need
16 to.

17 **MS. BLIZZARD:** Yes, Your Honor. We're generally
18 ready to accept the schedule proposed by the plaintiffs. No
19 problem with that.

20 **THE COURT:** Okay. And just to catch everybody up on
21 the States side, I'm sure you will hear or you already have
22 heard from your colleagues, it's sort of a one-and-done
23 briefing as much as we can possibly do. Okay?

24 And I'm perfectly fine, Mr. Rocca, with some additional
25 pages as long as they are reasonable.

1 Look, it's a Motion to Dismiss. It has its merits, but
2 they are few and far between. So be wise about what you do.
3 It's a rare day that a Motion to Dismiss drives a stake through
4 the heart of a case. I'm not saying it's impossible, but, you
5 know, just -- to me, you know, the end game here is probably
6 going to be trial.

7 So, you know, you and your client invest your resources as
8 you wish, but -- and certainly if there are legal arguments
9 that require some amendment, that that will happen and I'll
10 take that into account. But let's not get too hung up.

11 I mean, it's also October. I mean, if we're going to have
12 Motion to Dismiss proceedings and maybe amendments in November
13 and December. I mean, an April trial seems probably
14 unrealistic. So keep all that in mind.

15 Okay. Anything else from anybody?

16 **MR. EVEN:** Yes, Your Honor. If I may, one other
17 thing. Yonatan Even for Epic.

18 **THE COURT:** Oh, yes. Yeah.

19 **MR. EVEN:** We wanted to raise what we think is a
20 relatively minor issue, which is the number of designated house
21 counsel who are allowed to see documents that are designated
22 highly confidential. We have very early in the case agreed to
23 two designated house counsel for each.

24 We have now lived through the case for some time, and we
25 know that it's only going to accelerate from here on. And we

1 find that number to be too low for our client, and we would
2 like to add one more so that there will be three.

3 I think the recent process of the amendment is a good
4 example of that. We have, I think, 27 documents that we have
5 added in the Amended Complaint, the same documents that are
6 subject to the sealing motions that Your Honor just referenced.
7 Nineteen of those are designated highly confidential.

8 It may well be that they are properly so designated, but
9 it's really hard to have only two in-house people during July
10 working on a big amendment to a Complaint to a strategic case
11 like this.

12 And we are facing hundreds of thousands of documents that
13 are so designated. It may well be the designation is
14 warranted, but we think we need one more lawyer.

15 We've approached Google about that. We could not reach
16 agreement, and so I wanted to raise that issue with the Court,
17 if possible.

18 **THE COURT:** Okay. Let me ask you a question. Did
19 Epic designate some -- are you redacting portions of your own
20 Complaint for Epic documents?

21 **MR. EVEN:** No. We have not redacted anything. But
22 the sealing has nothing to do with it.

23 Of course, in our production of over 2 million documents,
24 we have also designated some documents.

25 And, of course, whatever Your Honor decides, we're fine

1 with it being reciprocal, so there are three at Google as well.

2 **THE COURT:** This is just a Google/Epic issue; right?
3 Nobody else has in-house counsel; is that right?

4 **MR. EVEN:** I believe that's right.

5 **THE COURT:** One more is too much, Mr. Rocca?

6 **MR. ROCCA:** Yes, Your Honor. This was laboriously
7 negotiated. We only wanted one. They wanted two. We
8 compromised. They now have two. Now we're increasing to
9 three.

10 These are highly sensitive documents, not just because
11 Epic is purporting to be a competitor of Google, but Google has
12 documents of Epic's competitors in the video game industry,
13 which is very competitive and very dynamic.

14 So it's not like -- there has been a compromise. The
15 Court entered an order, and now they want to change it. And we
16 don't see why having two in-house lawyers is improper.

17 The model protective order for the district contemplates
18 this very thing. And we gave them an extra one, and now they
19 want a third, and we just think -- we've negotiated it. It's
20 water under the bridge. The order should stay as is.

21 **THE COURT:** Are you, on the Google side, okay with
22 just two? I mean, it's --

23 **MR. ROCCA:** Yeah, we are.

24 **THE COURT:** It's a mountain of redaction motions, as
25 Mr. Even is suggesting. You're okay with two?

1 **MR. ROCCA:** We're okay with two. That's why we
2 landed in that spot. We wanted one, but we gave them two,
3 which is fine. But now we just think three is unnecessary at
4 this time.

5 **THE COURT:** Okay. Well, Mr. Even --

6 **MR. EVEN:** If I may, Your Honor.

7 So the history is that we actually wanted four, and they
8 wanted one, and we landed at two at the time because we thought
9 we could live with it. We had four in the Apple trial that we
10 just have gone through.

11 The number of documents is what it is. And a lot of them
12 Google has designated as highly confidential. As Your Honor
13 has said, it's a mountain of documents.

14 Yes, we are hopeful we could do it with two. Time has
15 passed. We see that that's very, very --

16 **THE COURT:** How are you going to address the
17 competitive issues that Mr. Rocca just discussed?

18 **MR. EVEN:** So actually the P.O. in this case goes
19 very far in addressing them.

20 If, Your Honor, goes back to 7.3(b) of the protective
21 order, it has -- we need to tell Google in advance who that
22 person would be. We need to commit that they are not engaged
23 in any competitive decision-making or competitive processes.

24 They can't even -- we can't even send them the documents
25 over email. We can only FTP. They have to destroy them after

1 14 days, otherwise we can only share them over Zoom or
2 something where they cannot retain a copy.

3 It's a very, very elaborate set of protections. More
4 elaborate, frankly, than I have seen in most other cases.

5 The default rule actually in the district is that there is
6 no limitation on the number of designated house counsel. Then
7 there is a footnote that says that you may decide to so limit
8 in appropriate cases.

9 We agree that this is an appropriate case to so limit. We
10 started out --

11 **THE COURT:** And I -- I didn't read the protective
12 order that recently, but can Google veto the nominee?

13 **MR. EVEN:** Yes, they can. There is a process. They
14 have 14 days to vet the nominee, and then not veto, but
15 approach the Court and explain why it is that they think that
16 that nominee is improper.

17 **THE COURT:** All right. So in other words, I would
18 decide a dispute if you have one.

19 **MR. EVEN:** Yes. Although we didn't have one so far,
20 and I doubt we would.

21 **THE COURT:** Well, Mr. Rocca, I -- if we're going to
22 try to keep this on an April calendar, I think the pace is
23 going to warrant -- if they need additional resources at Epic,
24 I can't really think of a good reason why not, particularly
25 with all those safeguards.

1 Is there something I'm missing?

2 **MR. ROCCA:** It's just the nature of the industry,
3 where Epic's legal team in-house will have access to hundreds
4 of thousands of documents of third-party -- not just of Google,
5 but of third parties who compete with Epic.

6 And, you know, we -- we negotiated a limit. It seems to
7 be -- this is not an outside counsel *attorneys' eyes only*
8 designation. This is *attorneys' eyes* and then the two that
9 they've identified.

10 If they want to swap in somebody -- if, for example, they
11 don't like the second person or the person has left the
12 company, then swap somebody in. Fine. But we just think it
13 makes sense to stick with the order that we negotiated over
14 many, many weeks.

15 **THE COURT:** Just out of curiosity. What happens --
16 I'll ask both of you. What happens if one of these in-house
17 people just quits and goes to another game company? How do
18 you --

19 **MR. EVEN:** There is language about that in the
20 protective order as well, Your Honor. That there is no current
21 intent to do that.

22 And obviously a lawyer has -- the in-house lawyer would
23 have their own obligations, if that intent arises, to obviously
24 alert.

25 And then we would have to work through that, presumably

1 find a replacement within Epic, and then put whatever walls
2 need to be placed on that --

3 **THE COURT:** I ask only because as you add people, the
4 odds that somebody is going to leave goes up. I mean, it's
5 just the nature of the business.

6 **MR. EVEN:** I understand, Your Honor.

7 And one other comment about that is that I hear what
8 Mr. Rocca is saying, but the truth of the matter is we're not
9 talking about a handful of documents; right?

10 The documents in the Complaint, as I said, over two-thirds
11 were designated highly confidential. They are not third-party
12 documents. They are Google documents by and large.

13 Third parties who did think that they have some crown
14 jewel document obviously get notice, and they were perfectly
15 capable and have come sometimes to this -- to us and said we
16 need a separate agreement that this particular document stays
17 only in outside counsel. And when that was reasonable, we've
18 agreed to that. I don't think a single dispute around that has
19 arisen to Your Honor so far. I don't expect it will in the
20 future.

21 But we're not talking about -- you know, if this was 15
22 documents, obviously that's doable. We're talking about
23 hundreds of thousands of documents, literally.

24 I don't think either party wants to challenge the other's
25 designations right now or thinks that there is anything

1 necessarily improper with that.

2 It's just there are some documents and we need to deal
3 with a strategic litigation on an ongoing basis on a relatively
4 fast pace.

5 **THE COURT:** Well, here is what I would like to do.
6 You and Mr. Rocca are going to have one more or two more
7 conversations about this. If you want work it out, say a week
8 from now, you just file a short joint statement saying, you
9 know, here is our dispute.

10 I would like, Mr. Even, some metrics from you about the
11 number of documents.

12 I also now -- you know, I'm not going to wade into your
13 employer/employee relationships, but before you started adding
14 people, I would also like some indication that the two people
15 you have now just can't do it.

16 I mean, if they are doing this only quarter time each and
17 spending the rest of their day on other business, I think you
18 need to exhaust their time first before you add a third person.
19 If there is some reason you can't do that because of the way
20 the business works, you need to tell me that.

21 But what I would like to hear is both the volume of the
22 documents and why the two people you have now don't have enough
23 hours in a week to handle it.

24 I mean, this is -- this is also somewhat sporadic. I
25 mean, this is not an all-day everyday thing for, you know,

1 week in, week out *ad infinitum*.

2 I just want a better explanation about why two people
3 working a normal work week, which I imagine at Epic is 50 to 60
4 hours, cannot do that. Okay?

5 If show me that, and you and Mr. Rocca can't make an
6 agreement, I'll see what I can do.

7 You work at everything well. I just -- I'm a little
8 cautious about expanding the number of people because these
9 jobs turn over and, you know, people change their minds and
10 move on. Then before you know it, the whole thing is a little
11 porous.

12 So that's where I'm coming from. Okay?

13 **MR. EVEN:** Understood, Your Honor.

14 **THE COURT:** All right. Good.

15 **MR. ROCCA:** Your Honor, final just a scheduling note,
16 if I may.

17 The Court provided some guidance on trial issues and other
18 scheduling items. We now have to meet-and-confer with all the
19 parties, including the States. We had promised, I think, a
20 filing July 29th or thereabouts.

21 **THE COURT:** Yes.

22 **MR. ROCCA:** I'm wondering whether we should build in
23 just a few more days in light of the meaty issues that you
24 raised. I'm not sure we're going to be able to --

25 **THE COURT:** How about -- I hesitate to ask because

1 it's never in my interest.

2 Are people leaving for the month of August? Is this,
3 like, a vacation thing? I'm not. We'll be here. Don't feel
4 pressured by that, but your Court will be here.

5 Yes, go ahead.

6 **MS. BLIZZARD:** Your Honor, I will be gone, but I have
7 36 fellow State Attorneys General.

8 **THE COURT:** You're covered.

9 **MS. BLIZZARD:** We will support this.

10 **THE COURT:** Thirty-six? I thought it was 34.

11 **MS. BLIZZARD:** If I admit that I lost count, is that
12 a bad thing?

13 **MR. EVEN:** Thirty-seven, Your Honor.

14 **THE COURT:** It's 37.

15 **MR. EVEN:** Thirty-six States and D.C. I believe.

16 **THE COURT:** All right. Well, Ms. Blizzard is
17 covered.

18 All right. How about -- you want two more weeks? You
19 want to do August 13th, something like that? Does that sound
20 better?

21 I really would like you to put some effort into it. So
22 how about -- anybody have a problem with August 13th?

23 **MS. GIULIANELLI:** None, Your Honor.

24 **MR. EVEN:** Not here.

25 **MR. ROCCA:** Thank you, Your Honor.

1 **THE COURT:** Of course. Yeah. Okay. Last call for
2 today. Anything else?

3 (No response.)

4 **THE COURT:** Good. Okay. All right. Thanks very
5 much everyone. Looking forward to your filings.

6 (Proceedings adjourned.)
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CERTIFICATE OF OFFICIAL REPORTER

I certify that the foregoing is a correct transcript from
the record of proceedings in the above-entitled matter.

Debra L. Pas

Debra L. Pas, CSR 11916, CRR, RMR, RPR

Friday, July 23, 2021